Hasnah bt Che Hassan v Hongkong Bank Malaysia Bhd (formerly known as Hongkong Shanghai Banking Corp Ltd)

HIGH COURT (KUANTAN) — BANKRUPTCY NO 29–413 OF 1994
VT SINGHAM J
28 DECEMBER 2009

Bankruptcy — Notice — Validity of — Altered or tampered — Amount towards interest and total amount inserted after being blancoed — Whether notice bad and ought to be set aside — Bankruptcy Rules 1969 r 39

Bankruptcy — Practice and procedure — Service of process — Bankruptcy notice and creditor's petition — Whether posted on correct address — Order of court for substituted service — Whether terms of order complied — Whether non-service in accordance to order fatal — Whether receiving and adjudicating order be set aside ex debito justitiae — Bankruptcy Rules 1969 rr 110 & 111

Bankruptcy — Receiving and adjudicating order — Setting aside — Appeal — Bankruptcy notice and creditor's petition — Whether defective — Whether deputy registrar exercised discretion mechanically and not judiciously — Delay in setting aside — Whether sufficient reasons advanced for delay — Whether adjudicating order should be annulled and receiving order rescinded — Bankruptcy Act 1967 s 105(1) — Bankruptcy Rules 1969

The appellant/judgment debtor ('JD') was appealing against the decision of the learned deputy registrar who had dismissed with costs the JD's application to annul the receiving order and adjudicating order. The JD contended, inter alia, that the learned deputy registrar had not exercised her discretion judicially in dismissing the said application on the following grounds: (i) the bankruptcy proceedings were not served at the correct address; (ii) the documents filed in court had been tampered with and should not be accepted by the court; (iii) the calculation of the interest was inaccurate and not in accordance with the terms of the consent judgement; and (iv) the affidavit affirmed by Idris bin Ismail as a resident officer in charge of the judgment creditor ('JC') and the bankruptcy notice had been tampered and blancoed to change the amount.

Held, allowing the appeal with costs:

(1) The JD had shown that the address of his previous premises was No

295-A, Jalan Kampung Tengah, Chukai, Kemaman. Whereas the posting of the bankruptcy notice and the purported posting of the creditor's petition pursuant to the order of court for substituted service was on premises No A-295, Jalan Kampung Tengah, Kemaman, Terengganu (see para 8).

(2) The onus was on the JC to produce rebuttable evidence against the allegation of the JD that the JD's address was No A-295, Jalan Kampung Tengah, Chukai, Kemaman and not No 295-A, Jalan Kampung Tengah, Kemaman and that it referred to the same premises instead of a bare averment. The JC had failed to rebut this material fact to show that the posting of both the bankruptcy notice and the creditor's petition had been effected on the correct premises of the JD. Accordingly, there was no proper and regular service on the JD. The fact that there was an advertisement in 'The Star newspaper' did not release the JC from its duty to post both the bankruptcy notice and the creditor's petition on the correct premises of the JD which was No 295-A, Jalan Kampung Tengah, Chukai, Kemaman (see para 10).

(3) Nowhere in the *afidavit penampalan* had the deponent stated that the creditor's petition was ever posted on premises No A-295, Jalan Kampung Tengah, Kemaman or at the notice board of the Magistrate's Court, Kemaman or at the High Court, Kuantan. This was a clear breach of the order of court which expressly stated that the creditor's petition and the order made therein be served on the JD by posting a copy of the same on the said premises and on the notice board of both the courts. Consequently, there had been non-compliance with r 114(2) of the Bankruptcy Rules 1969 as there was no evidential material that the creditor's petition had been served on the JD by way of substituted service in accordance with the order of court (see paras 12–13).

(4) The learned registrar seemed to have exercised her discretion mechanically and not judiciously when the receiving order and adjudicating order were granted as there was no evidential material before the court that the creditor's petition was posted in accordance with the order of court. On this ground alone, the application ought to have been allowed and the receiving and adjudicating order be set aside ex debito justitiae for failing to comply with an essential rule being service of process (see para 15).

(5) There were two conflicting versions as to the JD's position on 21 November 1995. In the receiving order and adjudicating order dated 21 November 1995, it was stated that the JD was present and the order was signed by the learned deputy registrar of the High Court Kuantan. Whereas, exhs P2 and P4 in the affidavit (encls 30 and 36) respectively, recorded by the same learned registrar on 21 November 1995 stated that the JD was not present. The issue as to whether the JD was present

A or not in court on the aforesaid date had a strong bearing to determine whether the bankruptcy notice was in fact served and posted at the correct premises of the JD and subsequently, the creditor's petition which was purported to have been posted pursuant to the order of court by way of substituted service (see para 22).

B (6) The alteration or tampering of the evidence in the affidavit and in the statutory form of the bankruptcy notice was inadmissible and the bankruptcy notice was bad in law and defective unless prior leave of the court had been obtained to correct the same. Accordingly, r 41 of the C Bankruptcy Rules 1969 did not apply as the defects were a matter of serious concern to the court where the original figures have been blancoed and rewritten without any initial and arguably could tantamount to tampering with evidence (see para 21).

D (7) As to the calculation of interest, there seemed to be a miscalculation and the amount claimed was more than the amount actually due. The consent judgment and the interest calculated as per the bankruptcy notice seemed to be inconsistent with the terms of the consent judgment and the variation of interest carried out arbitrarily. There was E factual and legal basis for this complaint which required detail explanation and breakdown which did not seem to have come from the JC (see para 34).

[Bahasa Malaysia summary

F Perayu/penghutang penghakiman ('JD') telah merayu terhadap keputusan timbalan pendaftar yang bijaksana yang telah menolak permohonan JD dengan kos untuk membatalkan perintah penerimaan dan perintah penghakiman. JD menegaskan, antara lain, bahawa timbalan pendaftar yang bijaksana tidak menggunakan budi bicara beliau secara adil kerana menolak G permohonan atas alasan-alasan berikut: (i) prosiding kebankrapan tidak disampaikan ke alamat yang betul; (ii) dokumen-dokumen yang telah difailkan di mahkamah telah diubah dan tidak patut diterima oleh mahkamah; (iii) pengiraan faedah tidak tepat dan tidak menurut syarat-syarat H penghakiman persetujuan; dan (iv) afidavit yang disahkan oleh Idris bin Ismail sebagai pegawai residen yang bertugas untuk pemiutang penghakiman ('JC') dan notis kebankrapan telah diubah dan dipadamkan untuk menukar jumlah.

I **Diputuskan**, membenarkan rayuan dengan kos:

(1) JD telah menunjukkan bahawa alamat premis-premis sebelumnya adalah No 295-A, Jalan Kampung Tengah, Chukai, Kemaman. Manakala penampalan notis kebankrapan dan penampalan yang bertujuan untuk petisyen pemiutang terhadap perintah mahkamah

untuk penyampaian gantian adalah pada premis No A-295, Jalan Kampung Tengah, Kemaman, Terengganu (lihat perenggan 8).

(2) Beban terletak ke atas JC untuk mengemukakan keterangan mematahkan pengataan JD bahawa alamat JD adalah No A-295, Jalan Kampung Tengah, Chukai, Kemaman dan bukan No 295-A, Jalan Kampung Tengah, Kemaman dan bahawa ia merujuk kepada premis-premis yang sama dan bukan penegasan kosong. JC telah gagal untuk mematahkan fakta penting ini untuk menunjukkan bahawa penampalan notis kebankrapan dan petisyen pemiutang telah diletakkan di premis-premis JD yang betul. Sewajarnya, tiada penyampaian yang betul dan biasa ke atas JD. Hakikat bahawa terdapat iklan dalam 'The Star newspaper' tidak melepaskan JC daripada kewajipannya untuk menampal kedua-dua notis kebankrapan dan petisyen pemiutang pada premis-premis JD yang betul iaitu No 295-A, Jalan Kampung Tengah, Chukai, Kemaman (lihat perenggan 10).

(3) Tidak ada di mana-mana dalam afidavit penampalan telah dinyatakan oleh deponen bahawa petisyen pemiutang telahpun ditampalkan di premis-premis No A-295, Jalan Kampung Tengah, Kemaman atau di papan notis Mahkamah Majistret, Kemaman atau di Mahkamah Tinggi, Kuantan. Ini dengan nyata satu pelanggaran perintah mahkamah yang dengan jelas menyatakan bahawa petisyen pemiutang dan perintah yang dibuat telah disampaikan ke atas JD dengan menampal salinan yang sama di premis-premis tersebut dan pada papan notis kedua-dua mahkamah. Akibatnya, terdapat ketidakpatuhan dengan k 114(2) Kaedah-Kaedah Kebankrapan 1969 kerana tiada keterangan yang material bahawa petisyen pemiutang telah disampaikan ke atas JD melalui penyampaian gantian menurut perintah mahkamah (lihat perenggan 12–13).

(4) Pendaftar yang bijaksana nampaknya telah menggunakan budi bicaranya secara mekanikal dan tidak secara bijak apabila perintah penerimaan dan perintah penghukuman dibenarkan kerana tiada keterangan material di hadapan mahkamah bahawa petisyen pemiutang itu telah ditampal menurut perintah mahkamah. Atas alasan ini sahaja, permohonan patut dibenarkan dan perintah penerimaan dan penghakiman diketepikan ex debito justitae kerana telah gagal mematuhi peraturan yang penting iaitu proses penyampaian (lihat perenggan 15).

(5) Terdapat dua versi bercanggah berhubung kedudukan JD pada 21 November 1995. Dalam perintah penerimaan dan perintah penghakiman bertarikh 21 November 1995, ia menyatakan bahawa JD telah hadir dan perintah itu telah ditandatangani oleh Timbalan Pendaftar Mahkamah Tinggi, Kuantan. Manakala, eksh P2 dan P4 dalam afidavit (lampiran-lampiran 30 dan 36) masing-masingnya, yang

telah direkodkan oleh pendaftar bijaksana yang sama pada 21 November 1995 menyatakan bahawa JD tidak hadir. Isu sama ada JD hadir atau tidak di mahkamah pada tarikh tersebut mempunyai pengaruh yang kuat untuk menentukan sama ada notis kebankrapan sebenarnya telah disampaikan dan ditampal di premis-premis JD yang betul dan kemudiannya, petisyen pemiutang yang bertujuan untuk ditampalkan menurut perintah mahkamah melalui penyampaian gantian (lihat perenggan 22).

(6) Penukaran atau pengubahan keterangan dalam afidavit dan dalam borang statutori notis kebankrapan tidak boleh diterima dan notis kebankrapan itu adalah tidak sah di sisi undang-undang dan cacat kecuali jika kebenaran terdahulu mahkamah diperoleh untuk membetulkan yang sama. Sewajarnya, k 41 Kaedah-Kaedah Kebankrapan 1969 tidak terpakai kerana kecacatan tersebut merupakan perkara yang amat membimbangkan mahkamah di mana jumlah asal telah dipadamkan dan ditulis semula tanpa apa-apa tandatangan dan boleh dihujahkan ianya sama seperti mengubah keterangan (lihat perenggan 21).

(7) Berhubung pengiraan faedah, terdapat pengiraan yang salah dan jumlah yang dituntut melebihi daripada jumlah sebenar yang perlu dibayar. Penghakiman persetujuan dan faedah yang dikira sepertimana notis kebankrapan nampaknya tidak konsisten dengan syarat-syarat penghakiman persetujuan dan perubahan faedah telah dibuat sewenang-wenangnya. Asas faktual dan perundangan untuk aduan ini yang memerlukan penjelasan dan huraian terperinci nampaknya tidak dibuat oleh JC (lihat perenggan 34).]

Notes

For cases on practice and procedure generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2831–2884.

For cases on receiving and adjudicating orders generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2939–2950.

For cases on validity of notice, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2632–2665.

Cases referred to

A Debtor (No 446 of 1918), Re [1920] 1 KB 461, CA (refd)

A Debtor (No 12 of 1970), Re, ex p Official Receiver v The Debtor [1971] 1 All ER 504, Ch D (refd)

A Debtor (No 994 of 1935), Re; The Debtor v Official Receiver [1936] 1 All ER 794, CA (refd)

Affin Bank Bhd v Major Galaxy Sdn Bhd & Ors [2006] 2 MLJ 466, HC (refd)

Affin Bank Bhd v Tan Sri Kishu Tirathai [2008] 3 MLJ 72; [2008] 2 CLJ 448, CA (refd)

Algamene Bank Nederland NV v Loo Choon Yow [1989] 2 CLJ 289, HC (refd)
Amos William Dawe, Re; Amos William Dawe v Wayfoong Mortgage and Finance (Singapore) Ltd [1980] 1 MLJ 200, CA (refd)
Amran bin Ahmad, Re, ex p MBF Finance Bhd [2005] 7 MLJ 477; [2005] 7 CLJ 172, HC (distd)
Application of Asia Insurance Co Ltd Osman, Re v Tan Swee Liang [1968] 2 MLJ 228, HC (refd)
Atwood v Chichester (1978) 3 QBD 722, CA (refd)
Azrin M Kamaluddin; ex parte Standard Chartered Bank [2007] 5 CLJ 132, HC (refd)
Beale v McGregor (1886) 2 TLR 311 (refd)
George Paul Daniel Arokiam, Berkenaan, ex p United Asian Bank Bhd [1990] 2 CLJ 750, HC (refd)
Bungsar Hill Holdings Sdn Bhd v Dr Amir Farid Datuk Isahak [2005] 2 CLJ 809, FC (refd)
Carr, Re (1886) 35 WR 150 (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
CGU Insurance Berhad v Asean Security Paper Mills Sdn Bhd [2006] 3 MLJ 1; [2002] 2 AMR 1489, CA (refd)
Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363, CA (refd)
Chen Sing Chew, Re; ex parte: Oriental Tin Smelters Sdn Bhd [1974] 2 MLJ 69, HC (refd)
Cheong Sooi Loong, Re, ex p Hong Leong Finance Bhd [1992] 2 MLJ 591, HC (refd)
Chong Chin Shoong v Development & Commercial Bank Bhd [1990] 1 MLJ 285, HC (refd)
Chong Peng Chong v Chin Lean Fatt & Ors [2004] 1 CLJ 22, HC (refd)
Craig v Kanssen [1943] 1 All ER 108, CA (refd)
Dato' Haji Mohd Muslim bin Othman v Shuaib bin Lazim & Anor [1993] 1 AMR 319, HC (refd)
Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd [1992] 2 MLJ 344, SC (refd)
David, Re, ex p United Asian Bank Bhd [1991] 2 MLJ 127, HC (refd)
Davidson, Re [1894] WN 210 (refd)
Development & Commercial Bank Bhd v Datuk Ong Kian Seng [1995] 2 MLJ 724; [1995] 3 CLJ 307, FC (refd)
Evans v Bartlam [1937] AC 473, HL (refd)
Francis Philips AJ Philips, Re; ex parte Bank Perusahaan Kecil & Sederhana Malaysia Bhd [2008] 10 CLJ 475, HC (refd)
Gilbert Engineering Co, Inc v Zainuddin bin Ahmad & Ors [2003] 6 MLJ 103; [2003] 3 AMR 555, HC (refd)
Haliza Suradei & Ors v Ng Eng Lee [2001] 1 CLJ 266, HC (refd)

A *Hamidah bte Abdul Hamid & Anor v Polynesia Offshore Supplies (B) Bhd* [1990] 3 MLJ 94, CA (refd)
Harley v Samson (1914) 30 TLR 450 (refd)
Ho Fok v Ann Bee (M) Sdn Bhd [2002] 5 MLJ 331; [2002] 2 AMR 1323, HC (refd)
B *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177; [2000] 3 CLJ 104, CA (refd)
Kang Chong Yeow, Re; ex p Mivan Far East Sdn Bhd [2001] 3 MLJ 98, HC (refd)
Khoo Kim Hock, Re [1974] 2 MLJ 29, HC (refd)
C *Koh Thong Kuang v United Malayan Banking Corp Bhd* [1994] 3 MLJ 509, SC (refd)
Kwong Yik Bank Bhd v Hah Chiew Yin Yin [1985] 2 MLJ 452, FC (refd)
Lim Boon Peng v United Orient Leasing Co Bhd [1991] 1 MLJ 292, SC (refd)
Lim Chooi Sang, Re; ex p Soon Fay Sdn Bhd [1998] 7 MLJ 286; [1999] 5 CLJ
D 605, HC (refd)
Lim Tai Nian; Re, ex p Kewangan Utama Bhd [2001] 4 MLJ 78, HC (refd)
Malayan Banking Bhd v PK Rajamani & Anor [2004] 3 MLJ 28, CA (refd)
Motor Emporium, The v V Arumugam [1933] MLJ 276, HC (refd)
MUI Bank Berhad (dahulu dikenali sebagai Malayan United Bank Berhad) v
E *Datuk Syed Kechik bin Syed Mohamed* [1993] 1 AMR 757, HC (refd)
Muniandy a/l Thamba Kaundan & Anor v D&C Bank Bhd & Anor [1996] 1 MLJ 374, FC (refd)
Ng Hee Thong & Anor v Public Bank Bhd [2000] 2 MLJ 29; [1995 1 CLJ 609, CA (refd)
F *Peh Kong Wan, Re, ex p United Malayan Banking Corp Bhd* [1992] 2 MLJ 292, HC (refd)
Peter Wong, Re; ex parte The Debtor [1959] MLJ 27, CA (refd)
Pg Hj Abdullah, Re, ex p Oriental Bank Bhd [1991] 3 CLJ 2899, HC (refd)
Sama Credit & Leasing Sdn Bhd v Pegawai Pemegang Harta, Malaysia [1995]
G 1 MLJ 274, SC (refd)
Sebastian, Re, ex p Metroplex Leasing & Credit Corp Sdn Bhd [1990] 3 MLJ 248, HC (refd)
Sharma Kumari Shukla, Re; ex p Dato' Abdullah Hishan bin Hj Mohd Hashim [2000] 5 MLJ 430, HC (refd)
H *Sharma Kumari Shukla, Re; ex p Dato' Abdullah Hishan bin Haji Mohd Hashim (No 2)* [2000] 6 MLJ 391; [2000] 6 CLJ 364, HC (refd)
Shuaib bin Lazim, Re, ex p Merchantile Insurance Sdn Bhd [1992] 4 CLJ 2066, HC (refd)
Stephen Wong Leong Kong, Re, ex parte HSBC Bank Malaysia Bhd [2005] 5
I CLJ 504, HC (distd)
Supreme Finance (M) Bhd v Mohamad Noor (t/a Everway Food Centre) & Ors [1993] 2 MLJ 29, HC (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30; [1996] 1 CLJ 241, FC (refd)

UMW Industries (1985) Sdn Bhd (formerly known as UMW (Malaya) Sdn Bhd) V Lim Chee Hian @ Lim Iek Wha (trading as Syarikat Zalal) [2005] 2 MLJ 239; [2005] 1 CLJ 173, CA (refd)
United Malayan Banking Corpn Bhd v Syarikat Perumahan Lunas Sdn Bhd [1988] 1 MLJ 546, HC (refd)
United Oriental Assurance Sdn Bhd v Ng King See [1987] 2 MLJ 264, HC (refd)
Yeap Chee Fun, Re; ex p Pernas Trading Sdn Bhd [2000] 5 MLJ 510, HC (refd)
Yew Leek Enterprise Sdn Bhd v Foong Engineering & Constructions Works Sdn Bhd [1990] 2 MLJ 62, HC (refd)
Yong Tet On Paul, Re, ex p Chung Khiaw Bank Ltd [1996] 1 MLJ 721, HC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 38(1)(a), 105(1), 131
Bankruptcy Rules 1969 rr 39, 41, 109, 110, 110(1), (2), 111(1), 114(2), 115, 274, 276
Rules of the High Court 1980 O 41

Bastian Vendargon (R Sarengapani with him) (Vendargon & Partners) for the appellant.
Wai Lai Fong (Shearn Delamore & Co) for the respondent.

VT Singham J:

[1] This is an appeal to the judge in chambers (encl 42) by the appellant/judgment debtor ('JD') against the decision of the learned deputy registrar dated 16 June 2008 (encl 58). The learned deputy registrar had dismissed with costs the JD's application by way of summons in chambers dated 11 January 2007 (encl 21) to annul the receiving order and adjudicating order given on 21 November 1995. The JD who is dissatisfied with the decision of the learned deputy registrar had filed this notice of appeal to the judge in chambers dated 17 June 2008 (encl 42). An appeal to the judge in chambers, the jurisdiction to review, rescind or vary any order made by the registrar under the bankruptcy proceedings is a rehearing.

[2] The grounds raised by the JD before the learned deputy registrar in support of the application to annul the receiving order and the adjudicating order given on 21 November 1995 by way of summons in chambers (encl 21) are briefly as follows:

(a) the bankruptcy notice and creditor's petition were not served on the judgment debtor at the correct address;

(b) the cause papers have been tampered with;

A (c) the calculation of the sums claimed was not in accordance with the terms of the consent judgment;

(d) the request for the issuance of the bankruptcy notice was invalid.

B **[3]** The submissions of learned lead counsel on behalf of the JD in this appeal is that, the learned deputy registrar had not exercised her discretion judicially in dismissing the said application (encl 21). By written submission (encl 53), it has been submitted on behalf of the JD, which briefly, is as follows:

C (a) The bankruptcy proceedings (BN and CP) were not served at the correct address.

(b) The documents filed in court (encl 4 and encl 2 and the affidavit of Idris bin Ismail affirmed on 7 September 1994) had been tampered D with and cannot be accepted by the court.

(c) The calculation of the interest is inaccurate and not in accordance with the terms of the consent judgement.

E (d) The submission of learned counsel on behalf of the respondent/JC through Idris bin Ismail had no authority to act in enabling the JC to commence bankruptcy proceedings.

(e) Sufficient reasons had been given by the JD in filing the application at F this stage.

[4] The submissions of the respondent/judgment creditor (JC) as contained in the written submission (encl 55) is briefly as follows:

G (a) The JD was unable to satisfy the judgment debt and the receiving order and adjudicating order was rightly made.

(b) *Service* of the bankruptcy notice and *the creditor's petition is regular*. (Emphasis added.)

H (c) *Amendment to the bankruptcy notice and affidavit are regular*. (Emphasis added.)

(d) The JD's calculation of the amount and interest in the bankruptcy notice was prepared purely in support of the application to annul the adjudicating order and receiving order and is therefore a self-serving I statement and ought to be disregarded.

Learned counsel for the JD had referred to the following cases:

(a) *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; [1996] 1 CLJ 241;

(b) *Chong Chin Shoong v Development & Commercial Bank Bhd* [1990] 1 MLJ 285;

(c) *Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd* [1990] 3 MLJ 248;

(d) *Gilbert Engineering Co, Inc v Zainuddin bin Ahmad & Ors* [2003] 6 MLJ 103; [2003] 3 AMR 555;

(e) *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363;

(f) *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177; [2000] 3 CLJ 104;

(g) *UMW Industries (1985) Sdn Bhd (formerly known as UMW (Malaya) Sdn Bhd) V Lim Chee Hian @ Lim Iek Wha (trading as Syarikat Zalal)* [2005] 2 MLJ 239; [2005] 1 CLJ 173;

(h) *Re Lim Chooi Sang; ex p Soon Fay Sdn Bhd* [1998] 7 MLJ 286; [1999] 5 CLJ 605;

(i) *Re Khoo Kim Hock* [1974] 2 MLJ 29;

(j) *Re Cheong Sooi Loong, ex p Hong Leong Finance Bhd* [1992] 2 MLJ 591;

(k) *CGU Insurance Berhad v Asean Security Paper Mills Sdn Bhd* [2006] 3 MLJ 1; [2002] 2 AMR 1489; and

(l) *Re Lim Tai Nian; ex p Kewangan Utama Bhd* [2001] 4 MLJ 78.

Learned counsel for the JC had referred to the following cases:

(a) *Bungsar Hill Holdings Sdn Bhd v Dr Amir Farid Datuk Isahak* [2005] 2 CLJ 809;

(b) *Re Stephen Wong Leong Kong ex parte HSBC Bank Malaysia Bhd* [2005] 5 CLJ 504;

(c) *Algamene Bank Nederland NV v Loo Choon Yow* [1989] 2 CLJ 289;

(d) *Re Sharma Kumari Shukla; ex p Dato' Abdullah Hishan bin Hj Mohd Hashim* [2000] 5 MLJ 430;

(e) *Re Amran bin Ahmad, ex p MBF Finance Bhd* [2005] 7 MLJ 477; [2005] 7 CLJ 172;

(f) *Re Yeap Chee Fun; ex p Pernas Trading Sdn Bhd* [2000] 5 MLJ 510;

(g) *Koh Thong Kuang v United Malayan Banking Corp Bhd* [1994] 3 MLJ 509;

(h) *Affin Bank Bhd v Major Galaxy Sdn Bhd & Ors* [2006] 2 MLJ 466;

A (i) *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544;

(j) *MUI Bank Berhad (dahulu dikenali sebagai Malayan United Bank Berhad) v Datuk Syed Kechik bin Syed Mohamed* [1993] 1 AMR 757;

B (k) *Lim Boon Peng v United Orient Leasing Co Bhd* [1991] 1 MLJ 292;

(l) *Re Kang Chong Yeow; ex p Mivan Far East Sdn Bhd* [2001] 3 MLJ 98;

(m) *Ho Fok v Ann Bee (M) Sdn Bhd* [2002] 5 MLJ 331; [2002] 2 AMR 1323;

C (n) *Azrin M Kamaluddin; ex parte Standard Chartered Bank* [2007] 5 CLJ 132;

(o) *Re Francis Philips AJ Philips; ex parte Bank Perusahaan Kecil & Sederhana Malaysia Bhd* [2008] 10 CLJ 475;

D (p) *Affin Bank Bhd v Tan Sri Kishu Tirathai* [2008] 3 MLJ 72; [2008] 2 CLJ 448

(q) *Re Chen Sing Chew; ex parte: Oriental Tin Smelters Sdn Bhd* [1974] 2 MLJ 69;

E (r) *Development & Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 2 MLJ 724; [1995] 3 CLJ 307; and

(s) *Re Sharma Kumari Shukla; ex p Dato' Abdullah Hishan bin Haji Mohd Hashim (No 2)* [2000] 6 MLJ 391; [2000] 6 CLJ 364.

F

[5] Having read and considered the request for issue of the bankruptcy notice dated 7 September 1994 (encl 4), bankruptcy notice dated 13 September 1994 (encl 2), consent judgment dated 14 December 1990 (encl 3), affidavit affirmed on 7 September 1994 by En Idris bin Ismail on G behalf of the JC, affidavit of non-service of the bankruptcy notice affirmed on 8 December 1994 by En Mohd Adzman bin Kasim, the order of court dated 20 December 1994 which had granted the bankruptcy notice to be served by way of substitute service (encl 6A), creditor's petition dated 21 March 1995 (encl 10A) together with the affidavit of truth of statement in petition H affirmed on 22 February 1995 by En Idris bin Ismail on behalf of the JC, the affidavit of non-service of the creditor's petition affirmed on 4 July 1995 by En Mohd Zaki bin Yusof, the order of court dated 19 July 1995 to serve the creditor's petition by way of substitute service (encl 12A), notice of hearing dated 19 July 1995 of the creditor's petition (encl 13A), affidavit of service of I advertisement affirmed on 6 September 1995 by En Gainneous Jacob Goldie in respect of the creditor's petition, the receiving order of creditor's petition dated 21 November 1995 and the order of adjudication dated 21 November 1995, summons in chambers dated 11 January 2007 (encl 21), affidavit in support of the JD affirmed on 11 January 2007 (encl 21A), JC's affidavit in

reply affirmed on 3 May 2007 (encl 23), JD's affidavit in reply affirmed on 15 May 2007 (encl 23A), JC's affidavit in reply affirmed on 12 July 2007 (encl 28), affidavit of Dato' Bastian Pius Vendargon affirmed on 21 August 2007 (encl 31), JD's affidavit in reply affirmed on 22 August 2007 (encl 30), JC's affidavit in reply (3) affirmed on 8 October 2007 (encl 33), JD's affidavit in reply affirmed on 17 December 2007 (encl 36), JC's affidavit in reply (4) affirmed on 14 January 2008 (encl 38), JD's affidavit in reply affirmed on 24 March 2008 (encl 40), notice of appeal to the judge in chambers dated 17 June 2008 (encl 42), written and oral submissions together with the bundle of authorities filed by both parties and having closely considered the Bankruptcy Act 1967 and the Bankruptcy Rules 1969, the decision of this court is as follows.

[6] In this jurisdiction, the law of bankruptcy is to be found in the Bankruptcy Act 1967 ('the Act') the Bankruptcy Rules 1969, ('the Rules'), the Bankruptcy (Costs) Rules 1969 and the Bankruptcy (Fees) Rules 1969 which govern procedure in bankruptcy cases. Bankruptcy proceedings have been held by the courts of a quasi penal nature, and so it is imperative that procedural requirement are strictly complied with (see *Hamidah bte Abdul Hamid & Anor v Polynesia Offshore Supplies (B) Bhd* [1990] 3 MLJ 94; *Re Pg Hj Abdullah ex p Oriental Bank Bhd* [1991] 3 CLJ 2899; *Re Stephen Wong Leong Khong ex p HSBC Bank (M) Bhd* [2005] 5 CLJ 504).

Under s 105(1) of the Act, the jurisdiction to rescind and to annul the receiving and adjudicating orders are discretionary and this court would have to consider the actual state of affairs at the date of the orders (see *Sama Credit & Leasing Sdn Bhd v Pegawai Pemegang Harta, Malaysia* [1995] 1 MLJ 274 at p 279). There are three distinct situations or limbs to consider and make an order of annulment, namely:

(a) where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or

(b) where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or

(c) where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country.

(see *Bungsar Hill Holdings Sdn Bhd v Dr Amir Farid Datuk Isahak* [2005] 2 CLJ 809). In the instant case, the JD is relying on the first limb.

SANCTION UNDER S 38(1)(A) OF THE 1967 ACT

[7] At the outset of this appeal and before this court proceeds to deliver its

decision on the merits of the appeal, it is only proper that this court deals with the legal issue and the objection raised by learned counsel for the JC that the JD has no locus to apply to set aside the receiving and adjudicating order given in his absence in this bankruptcy proceedings without the previous sanction of the official assignee (now known as the Director General of the Insovency Department) under s 38(1)(a) of the Bankruptcy Act 1967.

Section 38(1)(a) provides:

(1) Where a bankrupt has not obtained his discharge —

(a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency.

This court is of the considered view and which was later, during the course of the submission conceded by learned counsel for the JC that no previous sanction is required for such an application as in the instant case. The sanction referred to in s 38(1)(a) of the said Act does not apply to a bankrupt who is seeking the court's discretion to set aside the receiving and adjudicating order or any orders made by the court against him in the bankruptcy proceedings itself (see *Re Khoo Kim Hock* [1974] 2 MLJ 29 and followed in *Supreme Finance (M) Bhd v Mohamad Noor (t/a Everway Food Centre) & Ors* [1993] 2 MLJ 29). See also *Re Sebastian ex p Metroplex Leasing & Credit Corp Sdn Bhd* [1990] 3 MLJ 248.

THE BANKRUPTCY NOTICE AND THE CREDITOR'S PETITION WAS NOT POSTED ON THE CORRECT ADDRESS OF THE JD

[8] This court finds that the complaint of the JD of the non-service of the bankruptcy notice and the creditor's petition is not without any basis as the JD has been able to show that the address of his previous premises was No 295-A, Jalan Kampung Tengah, Chukai, Kemaman as contained in exh P1 of the JD's affidavit (encl 21A). Whereas the posting of the bankruptcy notice and the purported posting of the creditor's petition pursuant to the order of court for substitute service given on 20 December 1994 (encl 6A) and on 19 July 1995 (encl 12A) respectively was on premises No A-295, Jalan Kampung Tengah, Kemaman, Terengganu. The fact that there was an advertisement in 'the Star newspaper' does not release the JC from its duty to post both the bankruptcy notice and the creditor's petition on the correct premises of the JD which is No 295-A, Jalan Kampung Tengah, Chukai, Kemaman.

[9] This court also finds from the affidavit of non-service of the bankruptcy notice affirmed by one En Mohd Adzman bin Kassim on 8 December 1994 states that the deponent had been to premises No A-295, Jalan Kampung Tengah, Kemaman. The letter to the JD to fix an appointment to serve the

bankruptcy notice was also addressed to premises No A-295, Jalan Kampung Tengah, Kemaman by AR registered. A copy of the AR registered card (exh NA1) attached to the affidavit of non-service shows that the receiver of the same is a construction firm and not the JD. In fact exh MA2 in the JC's third affidavit (encl 33) being the approval letter of the overdraft facility from the JC is addressed to a firm Gulam Development and Construction (M) Sdn Bhd at K-124, Jalan Kampung Tengah, Kemaman whereas the address of the JD is stated as No 295-A, Jalan Kampung Tengah, Kemaman and yet the letter addressed to JD at A-295 was received by a construction firm and not the JD. Further, the affidavit of non-service of the creditor's petition affirmed by one En Mohd Zaki bin Yusof on 4 July 1995 also states that the deponent went to premises at No A-295, Jalan Kampung Tengah, Kemaman to effect service.

In *Re Yeap Chee Fun; ex p Pernas Trading Sdn Bhd* [2000] 5 MLJ 510, the bankruptcy notice was served by way of substituted service in accordance with the order of court. However, the objection of the debtor in that case were based on six grounds where the mode of service was challenged namely:

(a) failure to attempt service on the JD at his last known address;

(b) failure to comply with Practice Note No 1 of 1968;

(c) breach of r 110(1) of the Bankruptcy Rules 1969;

(d) the mode of substituted service was useless insufficient/ineffective/irregular/wrong;

(e) tainted with misrepresentation of material facts;

(f) no effective service as JD was not aware of the bankruptcy notice.

In that case, and on the set of facts, the court, inter alia, held, namely:

(a) where an order for substituted service is made the issue is not whether the judgement debtor knows about the bankruptcy notice or not, but whether the order for substituted service was correctly made and the subsequent service was in accordance with the order or not;

(b) the judgement debtor may or may not know about it at the time when the substituted service was made;

(c) no actual knowledge need to be proved; and

(d) the fact that the judgement debtor is not aware of the bankruptcy notice, even if it is true, does not nullify service.

In other words, the case *Re Yeap Chee Fun; ex p Pernas Trading Sdn Bhd* [2000] 5 MLJ 510 referred to by learned counsel for the JC, there was evidence that the bankruptcy notice was in fact served. The JD was aware of the proceeding as the JD had filed the application for an order that the substituted service of the bankruptcy notice be declared null and void about

two months after the service by way of SS and the advertisement. Accordingly, the learned registrar dismissed the JD's application to nullify the order for SS of the bankruptcy notice. The JD's appeal to the High Court against the registrar's decision was dismissed.

In *Re Peh Kong Wan, ex p United Malayan Banking Corp Bhd* [1992] 2 MLJ 292 VC George J (as he then was) said at p 296:

> ... in respect of application for substituted service where it is known or ought to be known that the JD (respondent) has ceased to reside in the last known address (as was the case in the instant case where the affidavit of non-service states that the JD had shifted), the registrar should be provided with some evidence as to the probable whereabouts of respondent (JD). The petitioner (JC) should make reasonable inquiries as to the whereabouts of the respondent and if it is suspected that he is out of the jurisdiction, that suspicion should be brought to the attention of the court so the order for substituted service could be formulated to the end that the respondent will in all probability, get to know of the facts of the bankruptcy notice or the presentation of the petition as the case may be. (this case has been referred in *Koh Thong Kuang v United Malayan Banking Corp Bhd* [1994] 3 MLJ 509 at p 513).

In *Koh Thong Kuang v United Malayan Banking Corp Bhd* [1994] 3 MLJ 509, the Supreme Court held that the learned registrar was perfectly justified in dismissing the JD's application to set aside the bankruptcy notice. In dismissing the appeal against the registrar's decision, the Supreme Court said at pp 512–513:

> There is evidence that between 1989 and 1993, the JD had entered or he had been in Malaysia on at least 14 different dates. The bank and its solicitors were justified in concluding as they did that the debtor was deliberately evading service and in the face of the various addresses he had given as being his residential addresses were entitled, in directing their mind as to what the last known address of the debtor was, to decide on the No 146 Jalan Maarof address although it was clear that he was no more residing at that address.
>
> When the application for SS was made, there was nothing which reliably suggested to the bank or its solicitors that the JD had permanently moved out of Malaysia.
>
> The evidence available to the bank and its solicitors was that the debtor had addresses both in England and in Malaysia and was frequently travelling from Malaysia to England and back to Malaysia or vice versa. It would seem that an advertisement in either the English or Malaysian newspaper would in all probability have been equally effective to give him notice of the proceedings as it turns out the appellant had been aware within two days of the effective date of the SS of the bankruptcy notice, of its existence and was able to have affirmed and filed the affidavit in support of his application which he sought to have it set aside.

[10] In the instant case, there is a material doubt as to whether premises No 295-A, Jalan Kampung Tengah, Kemaman and No A-295, Jalan Kampung Tengah, Chukai, Kemaman in fact refers to the same premises as contended by the JC. The onus is on the JC to satisfy this court or produce rebuttable evidence against the allegation of the JD that the JD's address is No A-295, Jalan Kampung Tengah, Chukai, Kemaman and not No 295-A, Jalan Kampung Tengah, Kemaman and that it refers to the same premises instead of a bare averment. The JC has failed to rebut this material fact to show that the posting of both the bankruptcy notice and the creditor's petition had been effected on the correct premises of the JD. Accordingly, this court finds there is no proper and regular service on the JD as contended by the JD.

HEARING DATE OF THE CREDITOR'S PETITION

[11] This court finds that the advertisement in 'the Star newspaper' on 28 August 1995 and the notice of hearing (encl 13A) states that the creditor's petition will be heard on 12 September 1995 at 9am. However, there is no evidence that the JD had been informed of any adjournment or the actual date of the hearing of the creditor's petition, being 21 November 1995 when the receiving and adjudicating order was made against her on 21 November 1995. The *afidavit penampalan* affirmed on 23 August 1995 by one En Mohd Roslan bin Mohamad (encl 14A) refers to the order of court dated 19 July 1995 of the substituted service *and states that the said order of court has been posted* on premises No A-295, Jalan Kampung Tengah, Kemaman, on the notice board of the Magistrate's Court, Kemaman and on the notice board of the High Court, Kuantan. This *afidavit penampalan* (encl 14A) did not disclose that the creditor's petition, the affidavit of truth of statement in petition and the notice of hearing dated 19 July 1995 (encl 13A) have been posted by way of substituted service as ordered by the court on 19 July 1995. In fact, the endorsement made by the deponent also did not state that he had served or posted the creditor's petition, the affidavit of truth of statement in petition or the said notice of hearing (encl 13A).

[12] As the JC seems to have firmly relied on the posting itself and that the posting of the creditor's petition on the notice board of the Magistrate's Court, Kemaman and the High Court, Kuantan pursuant to the said order of court for substituted service was sufficient service, surely the JC must produce sufficient evidence that the creditor's petition has in fact been posted with the said order of court of substitute service and that the JC has complied with the terms of the said order of court. Further, by para 4 of the *afidavit penampalan*, the deponent has stated 'satu salinan Saman dan Perintah Penyampaian Ganti tersebut dilampirkan sebagai Ekshibit MR'. It is clear that nowhere in the *afidavit penampalan* (encl 14A), the deponent has stated that the creditor's petition was ever posted on premises No A-295, Jalan

Kampung Tengah, Kemaman (which is disputed by the JD as the correct address) or at the notice board of the Magistrate's Court, Kemaman or at the High Court, Kuantan. This is a clear breach of the said order of court dated 19 July 1995 which expressly states that the creditor's petition and the order made therein be served on the JD by posting a copy of the same on the said premises and on the notice board of both the courts.

[13] Consequently, there has been non-compliance with r 114(2) of the Rules as there is no evidential material that the CP had been served on the JD by way of substituted service in accordance with the order of court dated 19 July 1995.

Rule 114(2) of the Rules states:

> A Creditor's Petition shall not be heard until the expiration of eight days from the service thereof: provided that where the act of bankruptcy alleged is that the debtor has filed a declaration of inability to pay his debts or where it is proved to the satisfaction of the Court that the debtor has absconded or in any other case for good cause shown the Court may on such terms if any as the Court may think fit to impose hear the petition at such earlier date as the Court may deem expedient.

Rule 115 of the Rules states:

> The Registrar shall appoint time and place at which the petition will be heard and notice thereof shall be written on the petition and sealed copies and where the petition has not been served the Registrar may from time to time alter the first day so appointed and appoint another day and hour.

[14] Based on the affidavits filed by the JC, there is no evidence produced to the satisfaction of the court that the JD had absconded or any good cause has been shown why the bankruptcy notice and the creditor's petition were served by way of SS although there has been an order given by the learned registrar to serve the same by way of SS and why the creditor's petition was not heard on the date appointed, being 12 September 1995 as stated in the notice of hearing and in *The Star* newspaper. There is also no reason advanced why the creditor's petition was heard on a later date being 21 November 1995 and without any prior notice to the JD of the change of date.

[15] On the set of facts, in particular, taking into account the affidavit of posting, the learned registrar seemed to have exercised her discretion mechanically and not judiciously when the receiving order and adjudicating order were granted as there was no evidential material before the court that the creditor's petition was posted in accordance with the order of court dated 19 July 1995. On this ground alone, the application (encl 21) ought to have been allowed and the receiving and adjudicating order be set aside ex debito justitiae for failing to comply with an essential rule being service of process

(see *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; *Craig v Kanssen* [1943] 1 All ER 108 at p 113; *United Malayan Banking Corpn Bhd v Syarikat Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546; *Muniandy a/l Thamba Kaundan & Anor v D&C Bank Bhd & Anor* [1996] 1 MLJ 374; *Beale v McGregor* (1886) 2 TLR 311; *Atwood v Chichester* (1978) 3 QBD 722; *Harley v Samson* (1914) 30 TLR 450; *United Oriental Assurance Sdn Bhd v Ng King See* [1987] 2 MLJ 264; *Malayan Banking Bhd v PK Rajamani & Anor* [2004] 3 MLJ 28).

[16] This court finds that there are two material flaws and defects in so far as the service of the creditor's petition is concern. First, there is no evidential material that the creditor's petition has been served by posting on the said places as ordered by the court. Secondly, there is no evidence before this court whether the JD has been informed of the actual date of hearing of the creditor's petition which was on 21 November 1995 or of any adjournment as the original date as stated in the notice of hearing as published in 'The Star Newspaper' is 12 September 1995. Thirdly, whether the learned deputy registrar when making the receiving order and adjudication order on 21 November 1995 had considered the above matters to satisfy herself that all those requirements pertaining to the mode of service of the creditor's petition have been complied. In addition and admittedly, the receiving order and adjudication order dated 21 November 1995 does not reflect the true position of the JD, ie that she was not present in court as recorded in the notes of proceedings by the learned deputy registrar. Accordingly, the only reasonable inference which can be drawn on the set of facts in the instant case is that, the creditor's petition was not served on the JD by posting on the JD's premises, on the notice board of the Magistrate's Court, Kemaman and on the notice board of the High Court Kuantan as ordered by the court on 19 July 1995.

[17] Further, on going through the affidavit of non-service affirmed on 8 December 1994 by En Mohd Adzman bin Kasim, this court finds the deponent has not stated who had directed him to serve the bankruptcy notice on the JD and what was his capacity at the material time when he is supposed to have served the bankruptcy notice on the JD, ie whether he was a staff of the JC or a staff of the JC's solicitors or an officer of the court or a freelance process server employed by the JC's solicitors or the JC and who had precisely directed or authorised him to serve the bankruptcy notice on the JD. Although this observation by this court may not necessarily be a decisive consideration in determining whether service was in fact effected but upon considering the totality of the set of facts in the instant case, it has by necessity became a relevant factor in determining this appeal and *saman dalam kamar* (encl 21) in particular, when the service of the bankruptcy notice itself has been challenged by the JD as having not been served on him

A or posted on his premises. In any event, r 109 of the Bankruptcy Rules 1969 provides that the creditor's petition shall be served by specified persons.

Rule 109 states:

> 109 Personal Service
>
> A creditor's Petition *shall be* personally served and service shall be efffected by an officer of the Court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor. (Emphasis added.)

[18] This court also finds that r 110 and r 111(1) of the Bankruptcy Rules 1969 have also not been complied by the JC.

Rule 110 states:

> 110 Substitute service
>
> (1) If the Court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or for any other cause *it may order substituted service to be effected in such manner as it thinks fit*. (Emphasis added.)
>
> (2) Where any such *order has been carried out the petition shall be deemed to have been duly served on the debtor*. (Emphasis added.)

Rule 111(1) states:

> 111 Proof of service
>
> (1) *Service of the petition* shall be proved by affidavit. (Emphasis added.)

[19] Accordingly, this court is of the considered view that unless the requirement as contained in r 110 and r 111(1) have been complied, which the JC had failed to comply, the deeming provision as in sub (2) of r 110 cannot be activated. In the event, it is only reasonable to infer that the creditor's petition has not been posted on the places as ordered by the court on 19 July 1995. Therefore, there is non-compliance with the terms of the order of court dated 19 July 1995 to be read with r 110(1) and (2) and r 111(1) as to the service there is no affidavit evidence that the petition has been posted.

> ... bankruptcy involves a change of status and carries with it quasi-penal consequences. The bankrupt becomes subject to certain disqualifications in respect of his civil rights and public offices. It follows that the courts must be vigilant to ensure that there is no compromise in respect of the meeting of procedural requirements not only on the letter of them but also in the spirit of such

requirements. Per VC George J (as he then was) in *Re Peh Kong Wan, ex p United Malayan Banking Corp Bhd* [1992] 2 MLJ 292.

ISSUE THAT THE JD WAS NOT PRESENT IN COURT ON 21 NOVEMBER 1995 WHEN THE CREDITOR'S PETITION CAME UP FOR HEARING

[20] The receiving order and adjudicating order dated 21 November 1995 (exh CCC1) attached to the affidavit of the JC (encl 23) states that the JD was present in court on 21 November 1995. On the other hand, the JD has produced a handwritten copy of the notes recorded by the learned deputy registrar which was supplied on request to the JD's solicitors upon payment, which states that the JD was not present in court when the CP was called up for hearing on 21 November 1995 when the receiving order and adjudicating order was made (refer to exh P2 of *afidavit balasan* II (encl 30) and exh P4 of and *afidavit balasan* III of the JD (encl 36)).

[21] It is interesting to note that by para 7 of the *afidavit ketiga* of the JC (encl 33) in reply to the *afidavit balasan* II of the JD (encl 30), the JC has in fact admitted that it was the previous solicitors for the JC who had inadvertently stated in the receiving order and adjudicating order that the JD was present. In other words, the JC is saying that there is also a mistake in the receiving order and adjudicating order which has been extracted by the JC's previous solicitors. If indeed there was such a genuine mistake in the said order which the JC now claims was done by the JC's previous solicitors, is it not the duty of the JC or his solicitors to apply to the court to correct the order in order to reflect the true position of the JD on 21 November 1995 and to state that the JD was not present as has been correctly recorded in the notes of proceedings by the learned deputy registrar on 21 November 1995.

[22] This court finds that as far as the records shows there are two conflicting versions as to the JD's position on 21 November 1995. In the receiving order and adjudicating order dated 21 November 1995 which has been extracted, it is stated that the JD was present and this order was signed by the learned deputy registrar of the High Court Kuantan. Whereas the notes exhs P2 and P4 in the affidavit (encls 30 and 36) respectively, recorded by the same learned registrar on 21 November 1995 states that the JD was not present. This court finds that the issue as to whether the JD was present or not in court on 21 November 1995 has a strong bearing to determine whether the bankruptcy notice was in fact served and posted at the correct premises of the JD and subsequently, the creditor's petition which was purported to have been posted pursuant to the order of court dated 19 July 1995 by way of substitute service.

[23] Be that as it may, as to the submission of learned counsel for the JC that there is no evidence to support the JD's allegation that the building known as A-295, Jalan Kampung Tengah, Chukai, Kemaman had been demolished and even if there is no such evidence, what matters is, whether the posting of the creditor's petition pursuant to the said order of the court by way of substituted service was in fact posted on the JD's premises in order to bring the proceedings and the date of hearing of the creditor's petition to the notice of the JD. As stated above, the JC has failed to comply with the said order of court dated 19 July 1995 to be read with r 110 and r 111(1) of the Bankruptcy Rules 1969. This court is of the considered view that the service of documents as required by the rules in bankruptcy proceedings must be strictly complied.

[24] This court finds that the JC seems to be changing its evidence on the issue, whether the JD was present or not in court before the learned deputy registrar on 21 November 1995 when the creditor's petition was heard. By para 10 of the JC's affidavit (encl 23) the JC has alleged that the JD was attempting to lie to the court where it is stated, 'JD cuba membohongi Mahkamah ini dengan mendakwa kononnya tiada pengetahuan tentang prosiding ini *sedangkan adalah jelas faktanya bahawa beliau telah hadir di Mahkamah ini pada 21.11.1995 semasa perintah penerimaan dan perintah penghukuman tersebut direkodkan*', by referring to the copy of the said receiving and adjudicating order. By para 11 of the said affidavit, the JC still maintains and has alleged that, 'JD tidak mengetahui tentang segala prosiding kebankrapan adalah penafian kosong semata-mata sekiranya tidak mengetahui dan/atau diserahkan dokumen-dokumen tersebut kepadanya mana mungkin penghutang penghakiman boleh hadir di Mahkamah pada tarikh tersebut seperti yang direkodkan di dalam fail Mahkamah yang mulia ini'. By para 12 of the affidavit (encl 28), the JC still maintains that, 'dakwaan yang telah dibuat oleh JD tersebut adalah sama sekali tidak berasas. Segala kenyataan yang dideposkan adalah berdasarkan kepada perintah yang telah direkodkan di hadapan Mahkamah yang mulia ini adalah mengikut rekod JC, JD telah hadir di hari perbicaraan tersebut dan perintah Mahkamah telah disahkan oleh Mahkamah yang Mulia ini'. In other words, the JC has accused the JD as not a truthful person despite the fact that the JD had stated that she did not attend court and that the bankruptcy notice and the creditor's petition was not served on her. However, when the JD had rebutted the allegation of the JC that she was present by producing a copy of the notes of proceeding recorded by the learned deputy registrar on 21 November 1995 (exh P2) in the *afidavit balasan* (encl 30), the JC had changed its evidence. By para 7 of the *afidavit balasan ketiga* (encl 33), the JC has changed its evidence by stating that the deponent beliefs that, 'peguamcara JC terdahulu bagi JC mungkin telah dengan tidak sengaja menyatakan dalam Perintah Penerimaan dan Perintah Penghukuman yang telah disediakan oleh peguamcara terdahulu JC bahawa JD hadir'.

[25] It is important to state that the evidence on behalf of the JC is not consistent and the JC does not seem to have any positive evidence as to the true position, namely, whether the JD was present in court on 21 November 1995 where it has been alleged repeatedly that the JD was in fact present which is contrary to the notes of proceedings. The JC then changed their stand and as a desperate attempt has put the blame on the JC's previous solicitors who was supposed to have inadvertently stated in the receiving order and adjudicating order that the JD was present. This change of evidence by the JC came about after the JD was able to rebut the allegation that the JD was present in court by producing the notes of proceeding recorded by the learned deputy registrar that the JD was not present in court.

AFFIDAVIT AFFIRMED ON 7 SEPTEMBER 1994 BY EN IDRIS BIN ISMAIL AS A RESIDENT OFFICER IN CHARGED OF THE JC AND THE BANKRUPTCY NOTICE DATED 13 SEPTEMBER 1994 HAS BEEN TAMPERED AND BLANCOED TO CHANGE THE AMOUNT

[26] This court finds the complaint is also not without any basis as:

(a) para 3 of the said affidavit clearly shows and is not denied by the JC that there is a blanco and the figure 703.35 has been inserted. The bankruptcy notice under 'the amount due' and also at p 4 under item No 24 where the amount towards interest has been handwritten after having blancoed and the figure 703.35 in the column being the total amount has been inserted after the blanco;

(b) the JC has not been able to show or produce any rebuttable evidence that this blanco and alteration were done before the filing of the bankruptcy notice and the affidavit in court;

(c) it is important to state at this stage that the contents of the affidavit are accepted as evidence. Therefore, evidence cannot be altered or tampered with or even amended except that it may in certain circumstances be corrected where there is a genuine mistake and only with the leave of the court when the court is satisfied that there was a genuine mistake;

(d) in this case, both the deponent and the commissioner for oaths have not initialled at the figures or in the margin if the same were in fact correction and was done before the affirmation as it must be done before the deponent had affirmed the affidavit;

(e) there is no rebuttal evidence to support that this alteration and blanco was done before or at the time the deponent had affirmed the affidavit in the presence of the commissioner for oaths and before it was filed in court;

A (f) in fact, there is no initial at the figure or in the margin of the affidavit by the learned deputy registrar or on the places where the figures were altered if the same was done before it was filed in court or before the learned deputy registrar signed the bankruptcy notice; and

B (g) therefore, the reasonable inference that can be drawn on the set of facts on this issue is that, the alteration or tampering or the blanco and insertion of the figures was done after the deponent had affirmed the affidavit and the bankruptcy notice was signed by the learned Deputy Registrar of the High Court, Kuantan.

C Rule 39 of the Bankruptcy Rules 1969 states:

> 39 Erasures, alterations, etc
>
> Unless the Court otherwise orders, no affidavit shall be read or used in any
> D proceedings if there is any interlineation, alteration, or erasure in the body of the affidavit or jurat, unless the person before whom the affidavit was sworn has initialled the interlineation or alteration, and in the case of an erasure has re-written and signed or initialled in the margin of the affidavit any words or figures written on the erasure.

E

[27] The alteration or tampering of the evidence in the affidavit and in the statutory Form of the bankruptcy notice is inadmissable and the bankruptcy notice is bad in law and defective and unless prior leave of the court had been F obtained to correct the same. Accordingly, r 41 of the Rules does not apply as the defects are not formal or a mere irregularity or trivial but is a matter of serious concern to the court where the original figures have been blanchoed and rewritten without any initial and arguabally could tantamount to tampering with evidence.

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[28] Be that as it may, by paras 5.2(1) and 5.3(1) of the *afidavit ketiga* (encl 33) the JC has stated that 'the amendments' to the bankruptcy notice and the affidavit of En Idris bin Ismail which was affirmed on 7 September 1994 was done by the previous solicitors of the JC before the bankruptcy H notice and affidavit was filed in court. This court finds that this part of the evidence as hearsay and cannot be admitted or accepted as the truth. Although hearsay evidence to some extent may be admissible in interlocutory proceedings where the affidavit may contain statements of information or belief with the sources and grounds thereof, in the instant case, the facts I deposed in paras 5.2(1) and 5.3(1) of the *afidavit ketiga* (encl 33) are not from the personal knowledge of the deponent and did not disclose the sources and grounds of the statements of information or belief. The facts deposed are merely statements of information or belief and without any proper basis, sources and grounds of the statements of information or belief (see *Re*

Application of Asia Insurance Co Ltd Osman v Tan Swee Liang [1968] 2 MLJ 228; *Chong Peng Chong v Chin Lean Fatt & Ors* [2004] 1 CLJ 22).

[29] The admissibility of the hearsay evidence in interlocutory proceeding is not an absolute rule and depends on the facts of each case. In this case, as stated above, the evidence in the affidavit has been altered, blancoed and inserted with figures. The person who can truly give an explanation must necessarily be the deponent of that affidavit himself or the commissioner for oaths or at least the previous solicitor in charge of this case but certainly it cannot be Cik Melenia, the deponent of *afidavit ketiga* (encl 33) which was affirmed on 8 October 2007 and her evidence is hearsay and ought to be rejected.

[30] This court finds that the alteration and blanco are not formal defects which can be allowed to be used as evidence as r 39 is crystal clear that the requirements that the provisions therein are mandatory as the word 'shall' has been used in r 39. Whereas r 41 is discretionary. Rule 41 can only be invoked in the event, the court finds that there was only an irregularity which on the set of facts in the instant case is not the same.

[31] Be that as it may, and in all fairness to learned counsel for the JC it is only proper to state that the present solicitors took over conduct of the brief as from 4 October 2007 when the notice of change of solicitors (encl 26) was filed in court. As a result and taking into account the chronology of the documents filed in court, learned counsel for the JC, with respect, had to encounter an up hill task to persuade this court to dismiss the appeal. The background facts as highlighted in this judgement were against and contrary to the JC's contention.

[32] The facts in *Re Stephen Wong Leong Kong* [2005] 5 CLJ 504, *Re Sharma Kumari Shukla; ex p Dato' Abdullah Hishan bin Hj Mohd Hashim* [2000] 5 MLJ 430 and *Re Amran bin Ahmad; ex p MBF Finance Bhd* [2005] 7 MLJ 477; [2005] 7 CLJ 172 relied on by the JC can be distinguished when compared to the facts in the instant case and does not assist to support the JC's contention that the grounds raised by JD can be remedied. Accordingly, r 41 and r 274 of the Rules does not apply to the set of facts and circumstances in the instant case. Order 41 of the Rules of the High Court 1980 does not apply as there is specific Rules for bankruptcy proceedings to regulate proceedings under the Act and Rules (see r 276 of the Rules).

ISSUE THAT THE DEPONENT EN IDRIS BIN ISMAIL HAD NO AUTHORITY TO ACT ON BEHALF OF THE JC TO COMMENCE THE BANKRUPTCY PROCEEDINGS

[33] This court finds that there is no rebuttable evidence to the challenge

of the JC to show that the deponent has in fact the legal authority to commence the bankruptcy proceedings on behalf of the JC. There is no explanation or rebuttable evidence why the deponent is not able to produce at least a copy of the power of attorney if he has in fact been authorised in order to support the deponent's contention that he has the authority to commence bankruptcy proceeding on behalf of the JC despite the challenge of the JD as to the total amount due and the miscalculation of the interest (see *Re David, ex p United Asian Bank Bhd* [1991] 2 MLJ 127; *Ng Hee Thong & Anor v Public Bank Bhd* [2000] 2 MLJ 29; [1995 1 CLJ 609; *Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 2 MLJ 344).

In *Re Kang Chong Yeow; ex p Mivan Far East Sdn Bhd* [2001] 3 MLJ 98, there was a copy of the resolution under seal which produced on behalf of the JC as evidence and marked as an exhibit. The JD took objection to the authority of the officer who signed the creditor's petition and affirmed the affidavit in support to the creditor's petition. However, in response, a copy of the resolution under seal was produced on behalf of the JC as evidence and was marked as an exhibit to show the officer had the authority. In the instant case, no such documentary evidence has been produced despite the challenge by the JD on the authority of En Idris bin Ismail.

THE CORRECT AMOUNT OF INTEREST IS NOT REFLECTED IN THE BANKRUPTCY NOTICE AND NOT IN ACCORDANCE WITH THE CONSENT JUDGMENT

[34] As to the calculation of interest, there seems to be a miscalculation and the amount claimed is more than the amount actually due. By the bankruptcy notice issued to En Ali @ Abdul Aziz bin Hassan, one of the guarantors in respect of the same claim as against the JD, in Kuala Terengganu High Court, Bankruptcy No 29–667 of 2000, the JC had calculated the interest as RM59,736.92 from 16 April 1988 till 15 April 1994 whereas the interest calculated and claimed in the bankruptcy notice in the instant case from 16 April 1988 till 17 April 1994 (two days difference) totals to RM84,667.08 (see para exh P3 in *afidavit balasan* IV of the JD (encl 40)). The consent judgment recorded on 14 December 1990 and the interest calculated as per the bankruptcy notice seems not to be consistent with the terms of the consent judgment and the variation of interest seems to be carried out arbitrarily from time to time. There is factual and legal basis for this complaint which requires detail explanation and breakdown which does not seem to have come from the JC.

[35] As there is no explanation or rebuttable evidence to the glaring difference in the calculation of the interest, the JC is deemed to have accepted the JD's contention that there is a miscalculation in the interest and the

interest claimed in the bankruptcy notice is more that the amount due. The bankruptcy notice therefore is a nullity (see *Cheng Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363; *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177; [2000] 3 CLJ 104).

[36] As to the allegation raised on behalf of the JC that Dato' Bastian had been in correspondence with the JC/bank, it has been rebutted by the affidavit of Dato' Bastian (encl 31) that he had only represented En Abdul Aziz bin Hassan and did not represent the JD in the bankruptcy proceedings or En Hassan bin Abd Rahim as En Hassan bin Abd Rahim had passed away in the year 1993. If Dato' Bastian did not represent the JD which is not disputed and the fact that the letters were written in respect of the bankruptcy proceedings against the JD on the basis that the third guarantor was making attempt to settle the debt due to the JC does not necessarily make the JD aware of the bankruptcy proceedings as the solicitors were not acting for the JD and they have no legal obligation to inform the JD as the correspondence between the JC's solicitors and the solicitors for En Abdul Aziz bin Hassan.

DELAY

[37] The general rule is that, an application to set aside an order or judgment given in the absence of a party must be made promptly and within a reasonable time. However, the court still has the discretion in a proper case however long or inordinate or in particular circumstances, to disregard the lapse of time or delay if the delay has been clearly explained and justice so demands that the order or judgment obtained by default is sound to be irregular as in the instant case, (the receiving and adjudicating order). In those circumstances, the rule is that, it should be set aside ex debito justitiae. In the instant case, this court finds that the receiving and adjudicating order made on 21 November 1995 in the absence of the JD as above is irregular and ought to be set aside ex debito justitiae (see *United Oriental Assurance Sdn Bhd v Ng King See* [1987] 2 MLJ 264; *Berkenaan George Paul Daniel a/l Arokiam, ex p United Asian Bank Bhd* [1990] 2 CLJ 750). Nevertheless, the period of delay has to be considered or assessed from the date the JD knew or ought to have known of the default order, (the receiving and adjudicating order) having been made against her (see *Yew Leek Enterprise Sdn Bhd v Foong Engineering & Constructions Works Sdn Bhd* [1990] 2 MLJ 62; *Atwood v Chichester* [1878] 3 CBD 722; *Evans v Bartlam* [1937] AC 473; *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30, *Haliza Suradei & Ors v Ng Eng Lee* [2001] 1 CLJ 266). In the instant case, the JD only came to know of the receiving and adjudicating order when she applied for loan from a financial institution to buy a vehicle when she was informed that she was not qualified to obtained a loan. The JD then

appointed the solicitors to obtain the details of the bankruptcy proceedings. She then managed to obtain all the relevant documents from the insolvency department at the branch in Kuantan.

[38] This court is of the view that the same legal that the principle that a party who is seeking the indulgence of the court to set aside an order or judgment obtained by default should make full frank and honest disclosure of all relevant facts should also apply with equal force to an adversary. In the instant case, the JC had by affidavit evidence attacked the JD as being not truthful in reply to the JD's contention that she did not attend court on 21 November 1995. Before the JC embarks on an attack against the JD as not a truthful person the JC must obtain all relevant facts and the correct facts. In the instant case, the JD has been able to produce sufficient evidence, namely, the notes recorded by the learned deputy registrar that JD was not present in court on 21 November 1995. The learned deputy registrar has recorded in her notes of proceedings that the JD was not present in court on 21 November 1995 when the receiving and adjudicating order was granted. However, the JC in a round about turn, later puts the blame on the previous solicitors and that it was a mistake when it is stated in the receiving and adjudicating order that the JD was present in court. It is therefore clear on the totality of the evidence before this court that the JC did not have in their possession all the relevant facts and the correct facts to oppose the said application (encl 21) and consequently this appeal.

[39] In any event, this court like 'every court in this jurisdiction must have inherent jurisdiction to do justice between the parties, and apply such principles as are necessary or desirable for attaining such object, and for giving decisions which are in conformity with the requirements of the social conditions of the community where the law is considered' or the demands of justice (per Terrell AG CJ in *The Motor Emporium v V Arumugam* [1933] MLJ 276 at p 278).

[40] In the event, this court had erred in its findings in deciding in favour of the JD on the grounds raised on behalf of the JD, this court is of the considered view that the receiving and adjudicating order cannot still be sustained as *first*, there is no evidence that the creditor's petition had been served by way of substituted service in accordance with the order of court dated 19 July 1995. *Secondly*, there is no evidence that the JD had been informed of any adjournment of the hearing of the CP or the change of date or the new date being 21 November 1995 as shown in *The Star* newspaper and as stated in the notice of hearing as 12 September 1995. *Thirdly*, the JC's reliance on the date of hearing as contained in the advertisement of *The Star* newspaper as being sufficient notice to the JD of the date of hearing of the

creditor's petition is in conflict with the date when the receiving and adjudicating order was granted, being 21 November 1995.

[41] In the circumstances, this court is of the considered view when taking into account the cumulative effect of the defects and in particular, the non-service of the creditor' petition in accordance with the order of court, it is not fair and equitable that the debtor should have seen adjudged a bankrupt. This court is satisfied that the JD has advanced sufficient reasons in support of the application (encl 21) to annul the adjudicating order made on 21 November 1995 and to rescind the receiving order of the same date under the first limb of s 105(1) of the Act respectively (see *Re Amos William Dawe; Amos William Dawe v Wayfoong Mortgage and Finance (Singapore) Ltd* [1980] 1 MLJ 200; *Re Peh Kong Wan, ex p United Malayan Banking Corp Bhd* [1992] 2 MLJ 292; *Kwong Yik Bank Bhd v Hah Chiew Yin Yin* [1985] 2 MLJ 452; *Dato' Haji Mohd Muslim bin Othman v Shuaib bin Lazim & Anor* [1993] 1 AMR 319; *Re A Debtor (No 446 of 1918)* [1920] 1 KB 461 at p 465; *Re A Debtor (No 12 of 1970) ex p Official Receiver v The Debtor* [1971] 1 All ER 504; *Re Davidson* [1894] WN 210; *Re Carr* (1886) 35 WR 150; *Re A Debtor (No 994 of 1935); The Debtor v Official Receiver* [1936] 1 All ER 794; *Re Shuaib bin Lazim, ex p Merchantile Insurance Sdn Bhd* [1992] 4 CLJ 2066).

[42] The cumulative merits of the various arguments and grounds raised by learned counsel for the JD is not without any basis as to the flaws and defects as found by this court which requires serious consideration in view of the fact that bankruptcy laws are to be strictly interpreted and complied. As far as this court is concerned, the paramount consideration in the instant case is to ensure that justice is done and parties comply strictly with the procedural requirements of the bankruptcy laws, ie the Bankruptcy Act 1967, the Bankruptcy Rules 1969 and the binding authority of precedent (see *Re Stephen Wong Leong Keong ex p HSBC Bank Malaysia Bhd* [2005] 5 CLJ 504; *Bungsar Hill Holdings Sdn Bhd v Dr Amir Farid Datuk Isahak* [2005] 2 CLJ 809). This court finds that substantial injustice has been caused by the several defects and flaws which are serious and the injustice cannot be remedied by invoking s 131 of the Act or r 274 of the Rules.

[43] There has been procedures impropriety and unfairness to the JD. It is the function of this court in this rehearing to put the records right and in accordance with the demands of justice. This is the essence of judicial duty. A litigant who has lost his or her case will not believe he or she has been fairly treated if his or her adversary is able to obtain an order or judgment against him or her by default without having served the cause papers as required by law and in this case, in accordance with the order of court made on 19 July 1995. Justice must not only be done but must manifestly be seen to be done. Therefore, this observation necessarily must mean the court must exercise its

A discretion judicially and not in reference to any mechanical formula otherwise it will defeat the whole purpose of a litigant seeking a judicial decision in cases filed in court (see *Re Yong Tet On Paul, ex p Chung Khiaw Bank Ltd* [1996] 1 MLJ 721; *Re Peter Wong; ex parte The Debtor* [1959] MLJ 27). Had the learned deputy registrar taken into consideration that the B creditor's petition was not served as per the affidavit of posting, there is a possibility that on the set of facts, she may not have granted the receiving and adjudicating order. This court cannot permit such travesty of justice to stand unrectified when it is brought to the attention of this court.

C **[44]** In the circumstances and in accordance with the rules of reason and justice, this court finds that this is a suitable case for this court to interfere with the order made by the learned deputy registrar on 21 November 1995 where the application of the JD was dismissed. On the set of facts, this court is satisfied that the receiving and adjudicating orders made on 21 November D 1995 ought not to have been having regard to the facts and circumstances of this case. Accordingly, the appeal by the JD is allowed and order in terms of the summons in chambers (encl 21) is granted to the JD namely, prayer (1) and (2). The adjudicating order is annulled and the receiving order is rescinded. The JD is allowed costs of this appeal.

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Appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed

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